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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 1

JOHN W. JOHNSON, Superintendent of Public Works of the State of New York,

Appellant,

v.

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S SUGGESTION OF MOOTNESS AND MOTIONS TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 386

JOHN W. JOHNSON, Superintendent of Public Works of the State of New York,

Appellant,

v.

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S SUGGESTION OF MOOTNESS AND MOTIONS TO DISMISS OR AFFIRM

I

As to Appellee's Suggestion of Mootness

The appellee suggests that by reason of the fact that the appellant's co-defendants in the Court below have abandoned this proceeding and that by virtue of the fact that the appellant is an agent of the Power Authority, employed in a purely ministerial capacity, he is bound by the Authority's abandonment, and the case is now moot.

But, the case is not moot and the appellant is not the agent, ministerial or otherwise, of the Authority. Although

the Superintendent of Public Works is the nominal party herein, he is the agent of, and has always acted for, the State of New York. The State is the real party in interest and the State is the real appellant herein. It is the State's title which has been vacated and annulled by the judgment of the Court below. The State of New York filed the appropriation map whereby title was vested in the State. This was in accordance with the terms of the statute (N. Y. Public Authorities Law § 1007[10]). It is there provided that the *State* shall acquire and retain *title*, provision being made for the right of the Power Authority to *possess* and *use* the land for its corporate purposes. In the event of subsequent disposition of such lands, it is provided in the statute that title shall be conveyed "*in the name of the people of the state*" on terms "*beneficial to the state*" as well as to the Authority.

The Power Authority is a creature of the State. In the "Declaration of policy" set forth in the Act which created it (Pub. Auth. Law § 1001) the New York State Legislature declared:

> (1) "Those parts of the Niagara and St. Lawrence rivers within the boundaries of the state of New York are hereby declared to be natural resources of the state for the use and development of commerce and navigation *in the interest of the people of this state and the United States.*"
>
> (2) "In order to provide for the most beneficial use of these natural resources, for the creation and development of hydroelectric power in the interest of the people of this state, * * * such natural resources, including the beds and waters of the said rivers as instrumentalities of commerce and navigation, and the beds, waters, power and power sites in, upon or adjacent to or within the water-sheds of the said rivers, owned or controlled by the people of the state, or which may hereafter be recovered by or come within their

> ownership, possession and control shall always remain inalienable to, and *ownership, possession and control shall always be vested in, the people of the state.*" (Emphasis added.)

For the purpose of effectuating its declared policy the Legislature of the State of New York created the Power Authority of the State of New York as a "*corporate municipal instrumentality of the state*," "a body corporate and politic," and "*a political subdivision of the state*." (Pub. Auth. Law § 1002; emphasis added).

Of pertinence, also, in this regard is the provision in the enabling Act (Pub. Auth. Law § 1009) which requires that contracts for the sale of power generated by the Authority must be approved by the Governor of the State of New York. So concerned were the sponsors of the act that its provisions be carried out that they were apparently unwilling to entrust full responsibility to the discretion of the appointed board of the Authority. As a result the Governor must pass upon each contract for the sale of power by the Power Authority. The Power Authority submitted its first contract to the Governor in 1955. Upon inclusion of several amendments dictated by the Governor, the latter approved the contract as amended.

In the face of the foregoing it cannot be maintained that the appellant acted in a ministerial capacity on behalf of the Power Authority. The fact is that he acted as the legal agent of the State. His acts were the acts of the State. The State is, most certainly, legally and factually, not the agent of the Power Authority nor can its rights be prejudiced, limited, or in any way circumscribed by the latter.

It is also significant to note in this respect that the State has done nothing to indicate that it has waived its rights

or that it has acquiesced in a waiver thereof on its behalf. In the condemnation proceeding brought by the Power Authority in the Western District of New York under Rule 71A of the Federal Rules of Civil Procedure, the State of New York was not joined as a party defendant. Since that proceeding is judicial in character, dependent upon jurisdiction *in personam* as well as *in rem*, any decree entered therein will be of no significance insofar as the title of the State of New York is concerned. The State has not moved to intervene therein and, as a matter of fact, would affirmatively oppose any move to bring it in as a party defendant. Had the State voluntarily joined in the pending condemnation proceeding or failed to object to its involuntary joinder therein, it might well have been argued that it, too, had abandoned its position in the case at bar. But it has not done these things.

Although *Sprunt & Son v. United States*, 281 U. S. 249, 258 (1929), is authority for the principle that acquiescence in a decree by one party may render moot the issues presented by the appeal of another party from the same decree, such determination was based on the fact that "A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed."

Compare *Fishgold v. Sullivan Corp.*, 328 U. S. 275 (1945) in which the plaintiff had acquiesced in the judgment by accepting the money damages. The intervenor sought certiorari. In answer to a suggestion of mootness, this Court said (pp. 282-283):

> "A decision on the merits of petitioner's claim necessarily involved a reconciliation between the Act and the collective bargaining agreement or, if it appeared that they conflicted, an adjudication that one superseded the other. As we have noted, the District Court was

> of the view that the collective bargaining agreement was not inconsistent with the Act. But, however the result might be rationalized, a decision for or against petitioner necessarily involved a construction of the collective bargaining agreement. That issue was adjudicated with the union as a party. Hence, if the union had thereafter instituted a separate suit for an interpretation of the agreement, it would be met with the plea of *res judicata*. And that plea would be sustained, for the prior decision was on the precise point which the union sought to relitigate and was adverse to the union. And both parties to the agreement—the union and the corporation—were parties to the prior suit. * * * The case of *Boston Tow Boat Co.* v. *United States*, *supra*, [321 U. S. 632], would be relevant if the collective bargaining agreement in issue was one between different parties. Then the union's interest would be merely the interest of one seeking reversal of an adverse precedent. And its 'independent right to relief' would not be increased by reason of its intervention in the cause. *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 255. But here the rights of the union and its members under a contract with the corporation were adjudicated in a proceeding in which the union was a party. The contract was still in existence at the time of the appeal. Hence the case was not moot. And the only way the union could protect itself against that binding interpretation of the agreement was by an appeal. For then the union found itself in the position where a right of its own (*Alexander Sprunt & Son* v. *United States*, *supra*, p. 255) was adjudicated."

See also *In re Merrill's Estate*, 29 Cal. 2d 520, 175 P. 2d 819, 822 (1946).

A reversal by this Court would restore recognition of the State's title herein with all that legally follows upon the possession of title. The test, it has been said, in determining whether writ of error should be dismissed on account of mootness is whether the plaintiff in error, in case of

reversal, could claim or enforce the rights upon which he insists (*Haley* v. *Bailey*, 199 Ga. 486, 34 S. E. 2d 685, 686 [1945]). The test as to mootness is whether there is "an actual controversy, and adverse interests" (*Lord* v. *Veazie*, 8 How. 251, 255 [1850], quoted in *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 43 [1944]), capable of being acted upon by a judgment which can be carried into effect (*Mills* v. *Green*, 159 U. S. 651, 653 [1895]; see also *Ex parte Baez*, 177 U. S. 378, 390 [1900]; *St. Pierre* v. *United States*, 319 U. S. 41, 43 [1943]; *Walling* v. *Helmerich & Payne, Inc.*, *supra*).

The controversy has not ceased to exist (as it did in *San Mateo County* v. *Southern Pac. R. Co.*, 116 U. S. 138, 142 [1885], in *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 313 [1893], and in *Brownlow* v. *Schwartz*, 261 U. S. 216, 217-218 [1923]), nor has the controversy been extinguished by subsequent events (as it was in *Little* v. *Bowers*, 134 U. S. 547, 556-557 [1890], *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120 [1901], *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 [1919], *Brownlow* v. *Schwartz*, *supra*, *Chandler* v. *Wise*, 307 U. S. 474, 477-478 [1939], and *Mine Safety Appliances* v. *Forrestal*, 326 U. S. 371, 372, n. 2 [1945]). The happening of subsequent events has not rendered it impossible for this Court to grant any effectual relief (as was the case in *Mills* v. *Green*, *supra*, *Cheong Ah Moy* v. *United States*, 113 U. S. 216 [1885], *Tennessee* v. *Condon*, 189 U. S. 64, 70 [1903], *Security Mutual Life Ins. Co.* v. *Prewitt*, 200 U. S. 446, 449 [1906], and *St. Pierre* v. *United States*, *supra*, 42-43) and the questions sought to be reviewed are not in the least abstract in character.

Conceding that appellate Courts do not sit to give opinions on moot questions or abstract propositions, and assum-

ing, *arguendo*, that the questions herein are moot, the proposition that an appellate Court may, despite such fact, retain an appeal for hearing and determination if it involves questions of public interest, is supported either directly or by implication by the great weight of authority (*Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498, 514-516 [1910]; *United States* v. *Trans-Missouri Freight Ass'n.*, 116 U. S. 290, 309 [1896]; *Matter of Cuddeback*, 3 App. Div. 103, 108-109, 39 N. Y. Supp. 388 [3rd Dep't., N. Y., 1896]; *Matter of Adirondack League Club* v. *Board of Black River Reg. Dist.*, 301 N. Y. 219, 222, 93 N. E. 2d 647 [1950]; *Matter of Glenram Wine & Liquor Corp.* v. *O'Connell*, 295 N. Y. 336, 400, 67 N. E. 2d 570 [1946]; *People of State of New York* v. *Peale*, 145 App. Div. 798, 801, 130 N. Y. Supp. 713 [1911]; *Matter of Neary* v. *Voorhis*, 207 App. Div. 419, 421, 202 N. Y. Supp. 236 [1923]; *Willis* v. *Buchman*, 240 Ala. 386, 199 So. 892, 894, 132 A. L. R. 1179 [1940]; see also Note at 132 A. L. R. 1186 *et seq.*]; *Tau Alpha Holding Corp.* v. *Board of Adjustments*, 126 Fla. 858, 171 So. 819, 820 [1937]; *State* v. *Franklin Farm Bureau*, 172 Kan. 179, 239 P. 2d 570, 579 [1951]; *Mason* v. *Commonwealth*, 383 S. W. 2d 845, 846 [Ky., 1955]; *Norton* v. *State Board of Tax Appeals*, 134 N. J. L. 57, 45 A. 2d 799, 801-802 [1946]; *Overesch* v. *Campbell*, 95 Ohio App. 359, 119 N. E. 2d 848, 850 [1953]; *Wortex Mills* v. *Textile Workers Union*, 369 Pa. St. 359, 85 A. 2d 851, 857 [1952]; *Industrial Commission* v. *State Federation of Labor*, 107 Colo. 206, 110 P. 2d 253, 254 [1941]; *Trust Company of Chicago* v. *Cornot*, 3 Ill., 2d 553, 121 N. E. 2d 779, 780 [1954]; *Morrison* v. *State*, 252 S. W. 2d 97, 100 [Mo., 1952]; *In re Suspension of License By Oregon Liquor Control Comm.*, 180 Or. 495, 177 P. 2d 406, 408 [1947]; *Morad* v. *Wyoming Highway Dep't.*, 66 Wyo. 12, 203 P. 2d 954, 957 [1949]). In *Matter of Rosenbluth* v.

Finkelstein, 300 N. Y. 402, 91 N. E. 2d 581, the Court said (p. 404):

> "Although the appeal has become moot and academic, we refrain from dismissing it because of the importance of the issue presented. * * * [T]he question is one of major importance and, because it will arise again and again, one that invites immediate decision."

See also *Board of Examiners, etc.* v. *Marchese*, 49 Ariz. 350, 66 P. 2d 1035, 1037 (1937) and *Wise* v. *First Nat. Bank*, 49 Ariz. 146, 65 P. 2d 1154, 1156 (1937).

With regard to the public importance of the questions presented, the Court's attention has been drawn to the chaos which will ensue respecting the validity of past and contemporary acquisitions of Indian lands, respecting the applicability of the Indian Intercourse Act to the State of New York, and respecting the acquisition of non-Indian lands by the State of New York, pursuant to N. Y. Public Authorities Law § 1007 (10) and Highway Law § 30 (Jurisdictional Statement, pp. 12-13). This statement was truly prophetic. In *St. Regis Tribe of Mohawk Indians* v. *State of New York*, 5 N. Y. 2d 24 (1958) a motion was made in the Court of Appeals of the State of New York for re-argument, based in part on the decision of the Federal Court of Appeals in the instant matter. The motion was denied on October 9th, but it would come as no surprise if the next step in the proceeding involved an application to this Court for certiorari. In *State Tax Commission* v. *Barnes*, a proceeding pending in Franklin County, New York, the St. Regis Indians have moved to have themselves declared immune to the payment of the State income tax, basing their position on the determination of the United States Court of Appeals in the instant proceeding. There has been a decision in this matter in favor of the State, but an appeal is anticipated. As to the situation respecting non-Indian lands, it may be noted that in five summary (dispossess)

proceedings[1], commenced under the authority of Highway Law § 30, subd. 12, the right of the petitioner (Superintendent of Public Works) to maintain the proceedings was challenged. The petitions were granted and final orders issued. The Court wrote an opinion.[2] In drawing this Court's attention to these occurrences, our purpose has been to demonstrate the substantiality of the questions presented. Review by this Court is not sought merely for the purpose of having this Court declare principles or rules of law for the government of future cases, but which cannot affect the matters in issue in the instant case. The matters in issue in the instant case involve the title of the State of New York. The Court of Appeals in the instant case has held that by virtue of the applicability of the Indian Intercourse Act to the State of New York the latter does not possess the inherent sovereign power to acquire Indian reservation lands. As a result, it has set aside and annulled the title acquired by the State of New York. Certainly this is an issue which is very much alive and which can be seriously affected in the instant case by a determination of this Court.

II

As to Appellee's Motion to Affirm Without Further Argument

Appellee moves to affirm the portion of the judgment sought to be reviewed on the ground that the questions presented are so unsubstantial as not to need further argument. Appellee bases this motion on the contentions:

---

[1] *Superintendent of Public Works* v. *Paonessa*; *Same* v. *Bregla*; *Same* v. *Ungaro*; *Same* v. *VeRost*; *Same* v. *Banach* (County Court, Niagara County).

[2] The opinion of the County Court of Niagara County (not yet reported) is set forth in Appendix A, *infra*.

(1) That the United States possesses paramount power to control and govern the territory reserved and held by Indians, including tribal lands in the State of New York; and

(2) That the Federal Government occupies a special position as the guardian and protector of Indian tribes, including those resident in the State of New York.

But the appellant's position in the first place, assuming *arguendo* that exclusive jurisdiction in the Federal Government is present, is that the Federal Government has not acted to inhibit State action in the taking of Indian lands by eminent domain. No federal statute is now on the books which has that inhibitory effect. It is contended by the appellant (see Jurisdictional Statement) that 25 U. S. Code §177 and 233 are not applicable to the State of New York insofar as such restraining effect is claimed. The Court of Appeals in the instant case has, of course, disagreed with the appellant's contention. It is submitted that the appellant has a right *fully* to be heard by this Court on this important and substantial question.

Secondly, assuming *arguendo* the paramount jurisdiction of the Federal Government, the appellant has questioned the right of the Federal Government thereby to impair the sovereignty of the State. (See Jurisdictional Statement, p. 12.) Certainly, this question is one which is not only of crucial importance in the disposition of the case at bar, but is a question of transcendent importance in the consideration of the contemporary legal mores respecting the relationship of Nation and State. As to this point, too, *full* argument should be heard by this Court.

It would not only be an injustice to deprive the appellant of its statutory right fully to be heard by this Court,

but it is unfair to the Court itself to ask it to rule on the substantive aspect of these questions on the basis of mere outlines or summaries of proposed arguments. It is submitted that the outline of the appellant's proposed argument, as set forth in the Jurisdictional Statement, is sufficient to convince the Court that it ought to note jurisdiction herein. The full arguments by both parties which will later be addressed to the Court will, it is presumed, be sufficient to enable the Court to render a decision on the merits of the case. Appellant is entitled, as a matter of statutory right, to an opportunity to present such full argument. He ought not to be summarily deprived of such right.

III

As to Appellee's Motion to Dismiss as to the Second Question Presented

Appellee moves to dismiss the appeal insofar as the second question presented is concerned on the ground that that question is not within the appeal jurisdiction of this Court as invoked by the appellant. The question involved is: "Is acquisition of title by eminent domain under the procedure set forth in the New York Public Authorities Law, Art. 5, Tit. 1, § 1007 and New York State Highway Law § 30 repugnant to 16 U. S. Code § 814 (Federal Power Act § 21)?"

A summary of the appellant's position on this question is set forth in the Jurisdictional Statement (pp. 10-12). To that statement may be added the argument advanced by Judge Page, in his opinion in the summary proceedings heretofore referred to, to the effect that the use of the word "may" in 16 U. S. Code § 814, establishes that the Federal Power Act does not create an exclusive pro-

cedure and that the statute is not mandatory in character (Appendix A, *infra*). It is also pertinent to observe that it was with respect to this point that Judge Swan dissented from the majority in the Court below.

The appellee criticizes the appeal on this question on the alleged ground that the Court of Appeals did not "*squarely*" find that the State procedural statutes were repugnant in their operation and effect to Federal Power Act § 21, but that the Court simply held, "as a matter of construction of Section 21 of the Federal Power Act, that Congress had not chosen the procedure set forth in the two New York statutes." But this is merely the other side of the same coin. Implicit in the determination of any question involving the possible repugnance of one statute to another is the necessity for analyzing and construing each of the statutes. If the Court below had so construed § 21 as to authorize the State procedure it would in effect, have held that the New York statutes were not repugnant thereto. If the Court below had construed the New York statutes as being in compliance with § 21 the same result would have ensued. As it was, it construed § 21 as not authorizing the New York statutory procedure and it construed the New York statutes as not being in compliance with § 21. The point is that the determination of the Court below involved the necessity of construing both the Federal statute and the State statutes. But this was only part of the judicial rationale which led to the ultimate judicial determination of repugnancy. Appellee has confused the *ratio decidendi* (repugnance) with the rationale (construction of the Federal and State statutes) which supported it.

It is submitted that whether you call it "Head" or "Tail" the character of the coin is not thereby changed.

It is not necessary that the Court hold squarely or categorically that one statute is repugnant to another; it is sufficient if that is the effect of its decision. Certainly, the effect, at least, if not the plain meaning, of the decision of the United States Court of Appeals is that the New York statutory procedure is repugnant to Federal Power Act § 21.

CONCLUSION

For the foregoing reasons we submit that this Court should:

(1) Reject the appellee's suggestion of mootness;

(2) Deny appellee's motion to affirm the portion of the judgment below sought to be reviewed;

(3) Deny appellee's motion to dismiss the appeal insofar as the second question presented is concerned;

(4) Note jurisdiction of this appeal; and

(5) Allow full argument on both of the questions which have been presented.

October 24, 1958.

Respectfully submitted.

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APPENDIX A

STATE OF NEW YORK

COUNTY COURT—NIAGARA COUNTY

—o—

In the Matter of Summary Proceedings by the SUPERINTENDENT OF PUBLIC WORKS, as Agent of POWER AUTHORITY OF THE STATE OF NEW YORK,

against

RAFFAEL PAONESSO, also known as RAFFAELE PAONESSA.

—o—

SAME,

against

WALTER BRODA and MARTIN BRODA.

—o—

SAME,

against

JOSEPH V. UNGARO and MARY L. UNGARO.

—o—

SAME,

against

MARTIN VE ROST.

—o—

SAME,

against

MICHAEL BANACH, JR. and DOROTHY BANACH, his wife.

—o—

Decision

BY JUDGE PAGE

OCTOBER 17, 1958

The premises which the petitioner seeks to obtain immediate possession of consist of improved real property in the

Appendix A

County of Niagara and are required for the improvement and development of the Niagara River for use in connection with the Niagara Power Project of the Power Authority of the State of New York, hereinafter referred to as the Power Authority.

There were five summary proceedings brought by the petitioner before this Court and the same defense was set forth by the respondents herein, therefore all five of these summary proceedings are to be treated as one.

The proceedings were instituted by the Superintendent of Public Works as agent* of the Power Authority of the State of New York against the respective respondents to obtain the possession of the premises described in each of the petitions, in accordance with the provisions of § 30 of the Highway Law, as made applicable by Article V, Title 1, of the Public Authorities Law of the State of New York.

Upon the return date of the summary proceedings, motion was made by counsel for the petitioner to strike out the answers as being sham and frivolous, and motions were also made by counsel for the respondents to strike out the petition as insufficient in law.

The major question brought before this Court is "whether or not the petitioner was authorized by law, or by statute, to obtain possession of the lands described in the petition."

It is not disputed that the waters of the Niagara River are under the jurisdiction and control of the Federal

* For the purposes of a summary proceeding, which involves the recovery of *possession*, the Superintendent could properly be designated as the agent of the Power Authority, because the latter is the entity which is entitled to possession under the statute (Pub. Auth. Law § 1007 [10]; *supra*, p. 2).

Government and for the State of New York to utilize the United States' share of such waters, permission would have to be granted by the Federal Government. The Power Authority is a state instrumentality created by Chapter 772 of the Laws of 1931, and the Power Authority Act has been amended in subsequent years and is found in the Public Authorities Law, § 1000 and following sections, and until 1958, it was available only for the purposes of the St. Lawrence River development. Prior to 1958, § 1007 of the Public Authorities Law did not refer to the development of the Niagara River but contained the following provisions in Subdivision 7 of that section:

> "The authority may, at its option, acquire such real property within the State of New York, under the general condemnation law or, in the event it is a licensee of the federal power commission it may acquire such real property as is necessary for its purposes through the exercise of the right of eminent domain, as provided in section twenty-one of the federal power act, as amended."

The Power Authority applied to the Federal Power Commission under Project No. 2216 for a license for the development of the Niagara Power Project and an order was issued January 30, 1958 which directed the issuance of such a license.

It is the contention of the respondents that the Power Authority is strictly limited to the rights and powers of eminent domain specifically set out in the Federal Power Act and that the petitioner cannot avail itself of the powers and privileges of eminent domain set out in the statutes of the State of New York.

It is their claim that the power of eminent domain in this case stems from a license issued to the petitioner, pursuant

to Public Law 85-159, 71 Stat. 401, which are now § 836 (a) of Volume 16 of the USCA, and they further contend that one of the conditions of the granting of such a license was contained in § 814 of the United States Code and referred to as § 21 of the Federal Power Act as amended, and that the petitioner, by virtue of this section, became vested with the governmental power of eminent domain in the District Court of the United States for the district in which such land or the property may be located, or in the State courts.

The Power Authority of the State of New York is an agency of the State and by act of legislature has been granted the power of eminent domain. The Legislature, by amending § 107, subdivision 10, has given to the Power Authority an additional method of exercising that power of eminent domain. The Federal Power Act by its very wording does not create an exclusive law of eminent domain for any licensee. The wording of the statute involved, § 814 of the Power Act, states as follows:

> "When any licensee cannot acquire by contract or pledges * * * it *may* acquire the same by the exercise of the right of eminent domain in the District Court of the United States for the district in which such land or other property may be located or in the State courts. * * * "

The use of the word "may" indicates that this is not a mandatory statute and merely gives to the licensee a method which can be used if the licensee desires to exercise its right of eminent domain in that way. In other words, this section is not an exclusive law of eminent domain but is complementary to the state statutes and an agency of the state which accepts a license can proceed either under the state's own power of eminent domain or under the

statute above referred to. In this proceeding the state agency has elected to proceed under the statutes of the State of New York. In *Oakland Club* v. *South Carolina PSC*, 110 P. 84, the Court stated in effect that the state agency has an election to exercise the power of eminent domain either under the specified enumerations of the Federal Power Act or under the broader provisions of the Eminent Domain Act of the State of South Carolina. This is a well-established rule.

The Federal statute of eminent domain merely gives to a licensee that does not have the power of eminent domain such a right but it is not intended to interfere with the power of eminent domain already existent in a state agency and the state does not surrender such power of eminent domain by the acceptance of a license.

Nowhere in the license granted by the Federal Power Commission is there any limitation with respect to the manner in which property may be acquired nor is there any actual limitation insofar as the Federal Power Commission Act is concerned. There is nothing in the law which suggests that the State of New York ever intended, nor did it ever surrender its sovereign power of eminent domain by authorizing and permitting the Power Authority of the State of New York to accept a license. The provisions of § 814 of the Power Act conferring the right of eminent domain upon licensees thereunder should be construed together with the laws of the State of New York in determining the power of eminent domain possessed by the Power Authority which was licensed under the Federal Power Act. *Burnett* vs. *Central Nebraska Public Power and Irrigation District*, 147 Neb. 458, 23 N. W. (2d) 661.

held substantially as stated above in reference to a Nebraska statute of condemnation.

The so-called Appropriation Act under which the property in question has been appropriated has been passed upon by the Courts of the State of New York. In *Cuglar vs. Power Authority*, 4 Misc. (2nd) 879, the Court carefully reviewed the power of the authority to take pursuant to Subdivision 10 of § 1007 of the Public Authorities Law of the State of New York. It is true that had to with the development of the St. Lawrence River, and it discussed that section together with the provisions of the license granted to the State of New York, and ruled that the procedure was in proper order. And in this case, as well as the case of *St. Regis* against *The State*, 5 N.Y. (2d) 24, the Court of Appeals sustained the proposition that the Power Authority in constructing the St. Lawrence Power Project was performing a state function and was entitled to employ the state's power of eminent domain. § 1001 of the Public Authorities Law contains a declaration of policy which states in part and in effect that the St. Lawrence and Niagara Projects are to be constructed for state purposes, and § 1002 creating the Power Authority of the State of New York states:

> "* * * and which shall have the powers and duties hereinafter enumerated, together with such others as may hereafter be conferred upon it by law."

It is obvious that the state never surrendered nor did it intend to surrender its power of eminent domain by the acceptance of a license from the Federal Power Commission.

Appendix A

The respondents call the Court's attention to a case decided in the United States Court of Appeals for the Second District July 24, 1958 involving the Tuscarora Nation of Indians against the Power Authority of the State of New York in which the Court questioned the validity of the procedure followed by the Power Authority in appropriating the lands of the Indian nation. The procedure followed was identical with the procedure followed in these cases. Statements were made by that Court stating that the procedure was invalid, but the case was before the Court to determine the proper method of taking the lands of the Tuscarora Nation of Indians and the validity of the Appropriation Act was not in question. The case is not clear when referring to this section as to whether or not their ruling is applied strictly to the problem involved in the taking of Indian lands.

Can a Federal Court pass upon the validity or constitutionality of a state statute which is not squarely before it? I think not. In the above case relied upon by respondents, the validity and constitutionality of the so-called Appropriation Act was not before the Court, the only question being before that Court is the taking of Indian lands. It is the Court's opinion that there was no declaratory decision by that Court as to the validity of the Appropriation Act which is binding upon the Courts of the State of New York.

The Court realizes that speed and urgency in the development of the Niagara Power Project is important to the State of New York and the people of Western New York, but the Court is also aware that it is entrusted with

the protection of the rights of the citizens of this State, and speed and urgency is not a sufficient excuse to abridge the rights of those citizens.

In the opinion of the Court, the rights of the citizens under the Appropriation Act are fully protected. § 30 of the Highway Law provides under subdivision 13 a method of a payment of sixty per cent of the amount determined by the Superintendent of Public Works to be the value of such claim, reserving to such owner or owners, however, the right to file such claim with the Court of Claims, or if the claim has been filed, reserving the right to prosecute said claim. Thus the respondents have the right to receive a partial payment immediately and a right given and reserved to them to proceed in the Courts of the State of New York to recover what they feel is a just and proper compensation.

It is the opinion of this Court that the procedure followed by the State of New York in the appropriation of respondents' land is a proper and valid procedure.

It is the contention of the respondents that the petition is insufficient as it fails to allege that funds have been made available by the Authority for the payment of the costs and expenses of the appropriation. It is true that the making of funds available may have been a prerequisite to the initiation of the appropriation proceeding, but it is not a prerequisite to the bringing of summary proceedings to remove the occupants and does not have to be alleged in the petition. The only requirement is proof that title is vested in the State and that the owner or occupant who is sought to be removed has been served with a forty-day notice to quit.

Appendix A

In accordance with this opinion, the motions of the respondents are hereby denied and the motions made by the petitioner also denied, and it is directed that the matter be returned to this Court for trial of any issues of fact which may be raised in the summary proceedings before this Court.

October 17, 1958.

J. RICHMOND PAGE,
Acting County Judge, Niagara County.

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JAMES R. BROWNING, Clerk

(347)

Supreme Court of the United States

No. 4 - October Term, 1959

JOHN BURCH McMORRAN, Superintendent of Public Works of the State of New York,

Appellant,

v.

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Appellee.

MEMORANDUM

April 25, 1960.

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IN THE

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Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This memorandum is filed in response to the direction of the Court, as set forth in the letter of its Clerk dated April 18, 1960.

I.

As to the question of mootness.

The decision and the opinion in *Federal Power Commission, et al. v. Tuscarora Indian Nation*, Nos. 63 and 66, October Term, 1959, neither add to nor detract from the situation respecting the question of mootness. They merely restore the factual situation which existed at the time the appellee made its suggestion of mootness.

That situation was that the Power Authority had abandoned its proceedings under the State's power of eminent domain and had elected to acquire the property by proceedings in the Federal District Court under Federal Power Act § 21. There is nothing which we desire to add to that which has already been stated on the question of mootness in our brief in opposition to appellee's suggestion of mootness other than to observe that if the Court of Appeals for the Second Circuit was wrong in holding that the Indian Intercourse Act was applicable to the State of New York, then the State of New York has become the owner in fee, by virtue of the instant appropriation, of the lands which are the subject of the condemnation proceeding in the Federal District Court. Under these circumstances, the State of New York, and not the Tuscarora Nation of Indians, will be entitled to payment of the compensation which will be awarded by the District Court, but the State will be subject to liability for the value of the land, in favor of the Tuscarora Nation—the value to be determined either by voluntary agreement or by award of the New York State Court of Claims.

In the event that the decision of the United States Court of Appeals, Second Circuit, brought here by the instant appeal, is held by this Court to have been erroneous, the condemnation proceeding in the United States District Court for the Western District Court, begun when the decision of the United States Court of Appeals, Second Circuit, was handed down, constitutes a completely futile and superfluous gesture.

II.

A word as to the merits.

In our jurisdictional statement (page 8) reference was made to *St. Regis Tribe of Mohawk Indians* v. *State of New York*, 5 N. Y. 2d 24 (1958), in support of the proposition that the provisions of the Indian Intercourse Act do not apply to the State of New York. This position is, of course, diametrically opposed to that of the United States Court of Appeals, Second Circuit, in the instant case, thus emphasizing the unabated importance of our appeal from that decision.

The *St. Regis* case involved the *purchase*, in 1796, of Indian land by the State. The instant appeal involves the acquisition of title to Indian land by the State through appropriation proceedings. The St. Regis Tribe in applying for certiorari rested their case on this conflict between the State and the federal courts. Our answering brief stressed the want of a grievance in the St. Regis Tribe, since they had been twice paid for what the State acquired from them; but it is true that the New York Court of Appeals did hold the Indian Intercourse Act inapplicable to the State. By denying the petition for certiorari (*St. Regis Tribe of Mohawk Indians* v. *New York*, 359 U. S. 910, No. 613 [1959]) and subsequently denying the petitioner's motion for leave to file a petition for re-hearing (*St. Regis Tribe of Mohawk Indians* v. *New York*, 359 U. S. 1015, No. 613 [1959]), this Court seems to have aligned itself with the New York Court of Appeals on this question.

To leave undetermined which Court—the New York Court of Appeals or the United States Court of Appeals,

Second Circuit—has correctly interpreted the powers of the State of New York, under circumstances and conditions which may readily recur, would be an unfortunate prolongation of dubiety in a field (title to land) where certainty should prevail.

CONCLUSION

Probable jurisdiction should be noted.

April 25, 1960.

Respectfully submitted,

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